Supreme Court, U.S.
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No. 96 599

In The Supreme Court Of The United States

OCTOBER TERM 1996

THE GLENBROOK COMPANY,

Petitioner,

v.

ERNST HOME CENTER, INC.,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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118 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the Ninth Circuit Court of Appeals directly conflict with this Court's decision in Erie Railroad Co v. Tomkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528, (1949), and Alyeska Pipeline Serv v. Wilderness Soc., 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975), because the Ninth Circuit refused to apply state substantive law governing the awarding of attorney's fees under an offer of judgment statute in this diversity action?

2. Does the decision of the Ninth Circuit Court of Appeals directly conflict with the decisions of other Circuit Courts of Appeals on the important question of determining whether a judgment finally obtained by the offeree is more favorable than an offer of judgment made under Federal Rule of Civil Procedure 68 because the Ninth Circuit compared the Judgment amount plus costs accrued to the date of the offer of judgment

against only the offer of judgment without costs accrued to the date of the offer?

3. Does the decision of the Ninth Circuit Court of Appeals conflict with the decisions of other Circuit Courts of Appeals on the important federal question of whether local rules of practice of the United States District Courts are binding upon the parties and the court because the Ninth Circuit refused to apply the local rule governing offers of judgment?

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OPINIONS BELOW

The United States District Court, District of Nevada, which was the trial court in this matter, filed its Findings of Fact and Conclusions of Law on September 16, 1994. Appendix. App. 43a. The trial court entered Judgment on September 30, 1994. App. 60a. The trial court also filed, on December 23, 1994 its Order granting Respondent's motion for attorney's fees and denying Petitioner's motion for attorney's fees. App. 62a.

The parties appealed the Judgment and the Ninth Circuit Court of Appeals filed its Memorandum decision on May 23, 1996. App. 1a. In response to the Memorandum decision, Petitioner filed a Petition for Rehearing on June 5, 1996. The Ninth Circuit then filed its Order on July 17, 1996 modifying its Memorandum decision.

JURISDICTION

The Ninth Circuit Court of Appeals filed its Order on Petition for Rehearing, which constitutes its final decision, on July 17, 1996. App. 73a. This Petition has been filed within ninety (90) days of that date. Jurisdiction exists under 28 U.S. 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

Nevada Revised Statutes 17.115 provides:

17.115 Offer of Judgment

1. At any time more than 10 days before trial, either informally or at any pretrial conference presided over by a judge of the court in which the action is pending, any party may serve an offer in writing to allow judgment to be taken in accordance with the terms and conditions stated at that time.

2. If the offer is accepted, the judge of the court in which the action is pending shall enter judgment accordingly.

3. If the offer is not accepted before trial or within 10 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.

4. If the party to whom the offer of judgment is made fails to obtain a more favorable judgment, he cannot recover:

(a) Interest on the judgment for the period between the time of service of the summons and complaint and the time of entry of the judgment; or

(b) Costs or attorney's fees, and the court shall order him to pay to the party who made the offer that party's taxable costs incurred from the date of filing the complaint, and may order also a reasonable sum to cover costs of the services of expert witnesses who are not regular employees of any party actually incurred and

reasonably necessary in the preparation of the case for trial by the prevailing party, interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees incurred by the party making the offer from the time of the offer.

5. Any taxable costs, attorney's fees and interest which is not derived from an interest-bearing obligation which may have been awarded must not be considered to be part of the judgment when determining whether the judgment was more favorable than the rejected offer.

6. If the attorney of the party for whom the offer of judgment is made is collecting a contingent fee for his services, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

7. Any judgment entered pursuant to this section shall be deemed a compromise settlement. (Emphasis added.)

Federal Rule of Civil Procedure 68 states as follows:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then

> file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

The former Local Rule of Practice 205-12 for the United States District Court for the District of Nevada, which was and continues to be applicable to this case, provides as follows:

> (Fed.R.Civ.P. 68). If the defendant offers a judgment in a certain sum with costs then accrued which is not accepted by the plaintiff, and the case thereafter goes to trial with the resulting judgment of only the amount

previously offered by the defendant, or less, then the defendant is the prevailing party. **Costs and attorneys' fees shall not be included in calculating which party is the prevailing party.** (Emphasis added.)

Local Rule of Practice IA 5-1 of the United States District Court for the District of Nevada provides:

EFFECTIVE DATE; TRANSITIONAL PROVISION.

These rules shall take effect on June 1, 1995, and govern all proceedings in actions brought on or after that date. Unless otherwise ordered by the court, proceedings in actions pending before June 1, 1995, shall be governed by prior practice of the court.

STATEMENT OF THE CASE

On August 30, 1991, Respondent Ernst Home Center, Inc., ("Ernst") filed its Complaint in the United States District Court for the District of Nevada against Petitioner The Glenbrook Company ("Glenbrook") seeking damages for an alleged breach of a shopping center lease. The basis for federal jurisdiction of the District Court was 28 USC §1332, diversity of citizenship of the parties. On May 7, 1992, Glenbrook made an offer of judgment offering to allow judgment in Ernst's favor "in the sum of Two Hundred Ten Thousand Dollars ($210,000.00) with costs incurred to date." This offer of judgment was made pursuant to both Federal Rule of Civil Procedure 68 and Nevada Revised Statutes 17.115. App. 14a. On May 11, 1992, Glenbrook attempted to revoke this offer of judgment. App. 33a, 34a. On May 15, 1992 Ernst filed a Notice of Acceptance of the Offer of Judgment but at the same time filed a Notice of Intent to Seek Attorney's fees in addition to the

offer of judgment. App. 25a. The parties then litigated the issues of whether Glenbrook could revoke its offer of judgment and whether Ernst validly accepted the offer of judgment since it sought attorneys fees in addition to the offer of judgment. The District Court resolved these issues by ruling that the offer of judgment was not revocable but that because there was no mutual assent as to whether attorneys' fees would be recovered in addition to the offer of judgment, any purported settlement based on the offer of judgment and acceptance was not enforceable against the parties. See Minute Order March 18, 1993, App. 41a. And see, Portion of Transcript of March 18, 1993 hearing set forth in Glenbrook Petition for Rehearing at pp. 3-4. App. 81a, 82a.

The case proceeded to trial and the trial court issued its Findings of Fact and Conclusions of Law on September 16, 1994 concluding that neither party had breached the lease but that Ernst was entitled to recover $175,617.12 in construction

costs. App. 43a. Glenbrook moved to recover its attorneys' fees and costs under NRS 17.115 since Ernst's Judgment was less than the offer of judgment. Glenbrook sought fees and costs in the amount of $151,164.72. Ernst also moved for attorneys' fees. Glenbrook opposed Ernst's request for fees on the grounds that NRS 17.115 prohibited an award to Ernst since its Judgment did not exceed the offer of judgment. The District Court denied Glenbrook's request for fees and granted Ernst's fees and costs in the amount of $182,588.55. App. 62a.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit. In addition to appealing from the Judgment, Glenbrook also appealed from the District Court's order denying its requests for fees and granting fees to Ernst. The Court of Appeals affirmed the District Court in all respects.

The issue in this Petition is the propriety of the decision of the Court of Appeals concerning the award of attorneys' fees. In its initial decision, the Court of Appeals held with regard to

this issue as follows:

> **Glenbrook's Attorney's Fees.** The district court properly denied Glenbrook's motion for fees and costs, rejecting the argument that Glenbrook was the prevailing party by virtue of having submitted an offer of judgment which Ernst accepted. The hearing on the offer of judgment resulted in both parties being released from the offer because it was not binding. Glenbrook made no further offers of judgment. The case proceeded to trial. Glenbrook cannot now claim that fee-shifting mechanisms apply to require that Ernst pay Glenbrook's costs and attorney's fees.

Glenbrook filed a Petition for Rehearing before the Court of Appeals on the grounds that its findings were clearly erroneous. Glenbrook argued that the record clearly showed that: (1) The District Court had determined that Ernst did not validly accept the offer of judgment, not that Ernst had accepted the offer; (2) The District Court concluded that the settlement, i.e., the offer and the acceptance, was not binding, not that the offer itself was not valid; and (3) Glenbrook was the prevailing party under NRS 17.115 because the judgment Ernst obtained

was not better than the offer of judgment (i.e., $210,000 versus $175,617.12).

The Court of Appeals issued an amended opinion in which it accepted Glenbrook's first two contentions as correct but still affirmed the District Court. In reaching this position, the Court of Appeals expressly refused to follow the provisions of NRS 17.115(5) which provides that in determining whether a judgment is more favorable than a rejected offer of judgment, costs and attorney's fees "must not be considered to be part of the judgment. . . ." Instead, the Court of Appeals compared the judgment plus accrued costs against the offer of judgment without accrued costs and concluded that Ernst's judgment exceeded the offer of judgment. The text of the amended opinion is as follows:

> **Glenbrook's Costs and Attorney's Fees.** Glenbrook made an offer of judgment in the amount of $210,000 prior to trial. It is argued whether in determining the effect of this for Federal Rule of Civil Procedure 68 or NRS 17.115(4) applies. In a diversity suit state rules

on the award of attorney's fees are valid unless they run counter to federal law. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259, n.31 (1975). Under NRS 17.115(4) Nevada does not include costs in determining whether the offer of judgment is greater than the judgment obtained. Federal courts compare the amount of the offer against the judgment actually received plus costs accrued to the date of offer. Marek v. Chesny, 473 U.S. 1, 9-10, n.2 (1985). In our case the lease, paragraph Twenty-Second, defined costs as "all costs incurred . . . in such litigation, plus reasonable attorneys' fees (including on appeal and including paralegal fees) to be fixed by the court." Ernst's judgment of $175,617.75, plus its costs of the date of the offer (over $125,000 in costs including attorney's fees) far exceed Glenbrook's offer of $210,000. We follow the federal rule in holding that Glenbrook's offer did not exceed what Ernst obtained by trial. The district court reached the correct result in denying Glenbrook's motion for fees and costs and in declining to apply the fee-shifting mechanism of NRS 17.115(4).

ARGUMENT IN SUPPORT OF PETITION

I.
THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT REQUIRING STATE SUBSTANTIVE LAW TO BE APPLIED IN DIVERSITY CASES.

The decision of the Court of Appeals in this case is directly contrary to this Court's holdings in Erie Railroad Co. v. Tomkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949), and Alyeska Pipeline Service Co. v. Wilderness Soc., 421 U.S. 240, 95 S.Ct. 1612, 44, L.Ed.2d 141 (1975). The decision is contrary to these authorities because it fails to apply the substantive law of the state of Nevada relating to the awarding of attorneys' fees in this diversity case. Additionally, the decision of the Court of Appeals is contrary to the decision of the Eleventh Circuit Court of Appeals in Tanker v. Management, Inc. v. Brunson, 918 F.2d 1524 (11th Cir. 1990).

Under Erie and its progeny, the substantive law of the of the state controls in diversity cases. Cohen, 337 U.S. at 555, 69 S.Ct. at 1230. The Ninth Circuit Court of Appeals has held that in diversity cases arising in the state of Nevada, Nevada statutes governing attorneys fees control. Schulz v. Lamb, 591 F.2d 1268, 1272 (9th Cir. 1978).

In this case, the Court of Appeals acknowledged that NRS 17.115 was applicable. However, the Court of Appeals refused to apply NRS 17.115(5), which provides that in determining whether the judgment exceeded the offer of judgment, attorneys fees and costs are not to be considered.[1] Instead, the Court of Appeals compared the amount of the offer alone against the judgment plus costs accrued to the date of the offer.[2] App. 73a. This is error.

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[1] In its decision, the Court of Appeals referred to NRS 17.115(4). However, it is apparent that the Court of Appeals was in fact discussing NRS 17.115(5).
[2] Although the Court of Appeals stated that this was the proper method under the federal rule, as discussed in section II below, this method actually conflicts with the federal rule as applied by other Circuit Courts of Appeals.

The Court of Appeals justified its decision by asserting that NRS 17.115(5) runs counter to federal law. This Court has held:

> "[In] an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

Alyeska, 421 U.S. at 259, 95 S.Ct. at 154, n.31 (quoting, 6 J. Moore, Federal Practice Section 54.77 [2], pp 1712-1713 (2d ed 1974). NRS 17.115 does not conflict with the federal rule for determining the prevailing party under Rule 68.

This case is similar to Tanker. In Tanker, the Eleventh Circuit Court of Appeals rejected the argument that Rule 68 preempted a Florida statute relating to offers of judgment and settlement offers. The Eleventh Circuit held that Rule 68 was not in "direct collision" with the Florida statute because "Rule 68 concerns only interest and offers of judgment, while the

Florida statute concerns attorney's fees, offers of judgment and settlement offers." Tanker, 918 F.2d at 1528.[3]

The United States District Court for the District of Connecticut reached a similar conclusion in Frenette v. Vickery, 522 F.Supp. 1098 (D. Conn. 1981). The Frenette court rejected the argument that Rule 68 preempted a Connecticut offer of judgment statute. In reaching its decision, the court relied on the fact that Rule 68 dealt only with costs while the Connecticut statute concerned interest as well as costs.

Similarly in this case, NRS 17.115 concerns interest, attorney's fees, costs and offers of judgment, while Rule 68 concerns only costs and offers of judgment. Therefore, NRS 17.115 is not in "direct collision" with Rule 68.

NRS 17.115 evinces Nevada's policy of encouraging settlement of litigation. Matthews v. Collman, 110 Nev. 940,

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[3]The statement in Tanker that Rule 68 concerns interest is curious given that Rule 68 does not mention interest. It would appear that the Eleventh Circuit meant costs instead of interest.

950, 878 P.2d 971, 978 (1994). NRS 17.115 is clearly substantive and more than a procedural rule: "With it or without it, the main action takes the same course. However, it creates a new liability where none existed before . . . ." Cohen, 337 U.S. at 556, 69 S.Ct. at 1230. The Ninth Circuit Court of Appeals decision eviscerates this policy. A party should not be able to thwart Nevada's offer of judgment settlement policy simply by filing a diversity action in federal court rather than state court. Alyeska, 421 U.S. at 259, 95 S.Ct. at 154, n.31. If the decision in this case is allowed to stand, NRS 17.115 has been rendered meaningless in diversity cases.

II.

THE COURT OF APPEALS' INTERPRETATION OF THE FEDERAL RULE DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Even if federal law rather than state law is applicable on this issue, the decision of the Ninth Circuit is erroneous and in direct conflict with the decisions of other circuits. The offer of judgment was for $210,000.00 "with costs incurred to date." Under the federal rule like judgments must be compared to determine if the final judgment is better than the offer of judgment. Specifically, the offer of judgment plus costs accrued to the date of the offer must be compared to the trial judgment plus costs accrued to the date of the offer of judgment. Marryshow v. Flynn, 986 F.2d 689, 692 (4th Cir. 1993); Grosvenor v. Brienen, 801 F.2d 944, 948 (7th Cir. 1986).

Thus, under the federal rule properly applied, Ernst failed to better Glenbrook's offer of judgment because the offer of judgment amount of $210,000.00 plus accrued costs exceeds

the judgment amount of $175,617.75 plus accrued costs. The Ninth Circuit's decision compared the final judgment plus accrued costs against the offer of judgment alone and without accrued costs. This decision is in direct conflict with the decisions of other circuit courts since it does not compare like judgments.[4]

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[4]It is worth noting that the same result will always apply under NRS 17.115(5) or the federal rule if the offer of judgment is made "with costs incurred to date" as it was in this case. As long as the costs incurred to the date of the offer of judgment are consistently added to both the offer of judgment and the final judgment or are not so added, the result will always be determined by whether the offer of judgment exceeded the final judgment. This is true since adding or not adding the same amount (costs incurred to date of the offer) to both the offer of judgment and the final judgment cannot change their relative values.

III.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS BECAUSE IT FAILS TO GIVE EFFECT TO THE APPLICABLE LOCAL RULE OF THE UNITED STATES DISTRICT COURT.

The Ninth Circuit Court of Appeal's decision ignores the local rule of the United States District Court for the District of Nevada applicable to this case. Former Local Rule 205-12[5] provides:

> (Fed.R.Civ.P. 68). If the defendant offers a judgment in a certain sum with costs then accrued which is not accepted by the plaintiff, and the case thereafter goes to trial with the resulting judgment of only the amount previously offered by the defendant, or less, then the defendant is the prevailing party. **Costs and attorneys' fees shall not be included in calculating which party is the prevailing party.** (Emphasis added.)

---

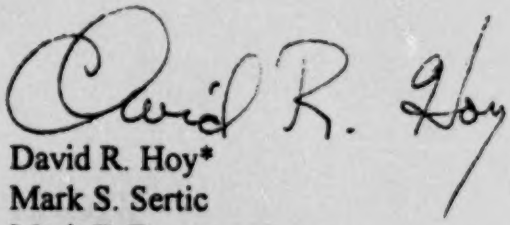
[5] The Local Rules of Practice for the United States District Court for the District of Nevada were amended effective June 1, 1995. The revisions do not include Local Rule 205-12. However, all proceedings pending prior to June 1, 1995, such as this one, are governed by the former rules. Local Rules of Practice for the United States Court for the District of Nevada IA 5-1.

This rule is identical to the provisions of NRS 17.115(5). Local rules of the United States District Courts "have the force and effect of law, and are binding upon the parties and the court which promulgated them . . . ." Woods Construction Co. v. Atlas Chemical Industries, Inc., 337 F.2d 888, 890 (10th Cir. 1964). "A litigant has a right to rely upon the local rules, as the parties and the court are bound by them." Id. at 891. The Ninth Circuit decision flies in the face of this local rule and the Tenth Circuit authority cited above.

CONCLUSION

The Ninth Circuit Court of Appeals should have reversed the District Court's award of attorneys fees and costs to Ernst and remanded to the District Court for an award of attorneys fees and costs to Glenbrook. The failure of the Ninth Circuit to reverse and remand violated the clear precedent of this Court and conflicts with the decisions of other United States Courts of Appeals. This Court should issue a writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals as to the award of attorneys fees and costs, and remand with instructions to award Glenbrook appropriate costs and attorney's fees.

Respectfully submitted.



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-15397/DC No. CV-91-00403-HDM

ERNST HOME CENTER, INC., a Washington corporation,

Plaintiff-Appellee,

v.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant-Appellant.

No. 95-15410/DC No. CV-91-00403-HDM

ERNST HOME CENTER, INC. a Washington corporation,

Plaintiff-Appellant/Cross-Appellee

v.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant-Appellee/Cross-Appellant

MEMORANDUM*

FILED
MAY 23, 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted April 11, 1996
San Francisco, California

Before: BROWNING, NOONAN, Circuit Judges, and MERHIGE**, District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The Glenbrook Company (Glenbrook) appeals an award of $175,617.75 in favor of Ernst Home Center, Inc. (Ernst) for costs incurred in beginning construction on the building Ernst planned to occupy as tenant in Glenbrook's new shopping center in Carson City, and an award of $182,588.55

for Ernst's attorney's fees and costs. We AFFIRM both awards including prejudgment interest, the denial of attorney's fees to Glenbrook and the denial of Ernst's motion for supplemental attorney's fees and additional costs.

FACTS

Glenbrook signed Ernst as an anchor tenant in a shopping center Glenbrook was developing in Carson City, Nevada. The lease obligated Ernst to build and Glenbrook, the landlord, to pay for the building Ernst was to occupy as tenant. Under paragraph 14.7 of the lease Glenbrook's obligation to pay a construction allowance was "contingent upon Landlord obtaining financing reasonably satisfactory to Landlord." If Glenbrook did not advise Ernst "in writing by March 1, 1991 that it has obtained such financing" Ernst could elect, by written notice to Glenbrook, to terminate the Lease. The contingency also provided that if Ernst elected so to terminate the Lease Glenbrook would pay "all costs incurred by [Ernst] in

connection with construction of the Building."

The lending market was tight and Glenbrook had trouble finding financing. On February 20, 1991 Glenbrook wrote to Ernst:

"We believe that we may have financing" with Bank of the West ("the Bank"). Ernst did not respond to the letter's request to indicate in writing that the Lease's March 1 financing deadline be extended until April 30th.

Ernst was eager to open its doors before its competitor, who was building directly across the street. Once the Bank issued a loan proposal Ernst paid $4,000 to accelerate the appraisal process. The Bank approved the loan on April 16. Before the Bank issued the loan documents Ellis Kantor and Rob King of Ernst and Randy Nahas of Glenbrook exchanged several telephone calls. The parties disagree as to what was said. Nahas testified to saying Glenbrook did not yet have the loan documents and raising concerns about mechanics liens if

construction began before the loan papers were filed. Kantor testified that Nahas only raised minor concerns such as title insurance and the permit. On April 23 Ernst told its contractor to proceed with construction after a May 3 pre-construction meeting.

Kantor and Nahas talked by telephone against on April 25. Ernst claims that Kantor asked Nahas to confirm that the financing contingency was satisfied. Glenbrook says that Kantor requested a letter on the current status of the loan. Glenbrook sent a letter that same day confirming the call:

> In conformance with Paragraph 14.7 . . . [Glenbrook] has obtained the approval of a construction loan from Bank of the West as of April 16, 1991. . . .
>
> This notice comes approximately one month and sixteen days after the March 1, 1991 deadline for obtaining financing. Will you please acknowledge, at the bottom of this letter, that it is not Ernst's intention to cancel the lease under this provision and fax it back to me. I will send the original to you for your signature.
>
> I hope this meets your needs. I know it meets mine.

The letter did not mention whether Glenbrook had or had not signed or approved the loan documents, or whether the loan was reasonably satisfactory to Glenbrook. By May 3 Glenbrook was aware that construction had begun, but neither party's counsel knew until May 8.

The district court found that on May 9 Glenbrook's lawyer advised counsel for Ernst that the April 25 letter constituted notice under the lease "that financing had been obtained and, therefore, Ernst could commence construction." Glenbrook received 280 pages of proposed loan documents on May 10. The next day Glenbrook concluded the loan was unacceptable and told the contractor to stop construction. Construction halted on May 13.

Glenbrook continued to negotiate the loan with the Bank. On May 16 Ernst wrote to Glenbrook that Ernst would terminate the lease on May 24 unless Glenbrook provided notice by then that Glenbrook had obtained financing and would pay

past and future construction costs. In a May 29 letter Glenbrook accepted Ernst's offer to terminate the lease.

PROCEEDINGS

Ernst brought the present suit against Glenbrook to recover its construction costs. Prior to trial Glenbrook extended two settlement offers, the first for $90,000 "with costs incurred to date." Ernst rejected this offer on May 4, 1992, in part because the offer did not provide for attorney's fees and litigation costs. Glenbrook's second offer, dated May 7, 1992 was for $210,000 "with costs incurred to date." Ernst responded on May 11 by writing to ask if the $210,000 included litigation costs and attorney's fees. On May 11 Glenbrook sent two letters to Ernst. The first letter withdrew the $210,000 offer and stated that the $90,000 offer remained open through that day. The second letter specified that the $90,000 offer did not include costs or attorney's fees. On May 15, 1992 Ernst

accepted the $210,000 offer and filed a "Notice of Intent to Seek Attorney's Fees". On May 22, 1992 Glenbrook filed a Motion to Strike Ernst's Purported Acceptance. At hearing on the motion the court concluded Glenbrook had made and Ernst had accepted an irrevocable offer of $210,000, but that the offer and acceptance "lacked mutual assent" because the parties understood "costs" differently. Thus, the court found, the offer and acceptance did not bind the parties and trial was appropriate. Glenbrook made no further offers of judgment.

On September 29, 1994 the district court entered judgment for Ernst of $175,617.75, plus prejudgment and post-judgment interest and attorney's fees. Ernst moved for supplemental fees and costs in October 1994. On December 23, 1994 the court ordered attorneys' fees and costs for Ernst of $182,588.55 and denied Ernst's motions for supplemental attorney's fees. That order also denied Glenbrook's post-trial motion for fees.

ANALYSIS

In a federal diversity action, this court applies a federal standard of review but applies state substantive law, reviewing de novo questions of state law. Nevada VTN v. General Ins. Co. of America, 834 F.2d 770, 773 (9th Cir. 1987). A denial of attorney's fees is reviewed for an abuse of discretion. Monrad v. FDIC, 62 F.3d 1166, 1171 (9th Cir. 1995). If any elements of legal analysis and statutory interpretation figure in the fee decision, those elements are reviewed de novo. Franklin Financial v. Resolution Trust Corp., 53 F.3d 268, 273 (9th Cir. 1995). A denial of costs is reviewed for abuse of discretion. Washington State Dept. of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 806 (9th Cir. 1995).

Termination of The Lease. Applying Nevada law this court construes unambiguous contract language "according to its plain meaning and usage." Nevada VTN, 834 F.2d at 773. The lease must be read as a whole to "give a reasonable and

harmonious meaning and effect to all its provisions." Id. Because the terms of paragraph 14.7 are not ambiguous, the district court properly did not look beyond the terms of the contract when interpreting paragraph 14.7.

The district court did not err in concluding that the May 24th termination terminated the lease under paragraph 14.7, and that paragraph 14.7 limits Glenbrook's liability to construction costs. Lease paragraphs 14.5 and 14.7 make Glenbrook responsible for construction costs. No lease provisions make Ernst responsible for construction costs. Construing the contract as a whole it is clear that only Glenbrook assumed responsibility for construction costs. Nothing in the lease limits those costs to expenses incurred before full commencement of construction. The district court correctly concluded that Glenbrook bore full responsibility for all construction costs incurred by Ernst through May 24th.

Glenbrook's Attorney's Fees. The district court properly denied Glenbrook's motion for fees and costs, rejecting the argument that Glenbrook was the prevailing party by virtue of having submitted an offer of judgment which Ernst accepted. The hearing on the offer of judgment resulted in both parties being released from the offer because it was not binding. Glenbrook made no further offers of judgment. The case proceeded to trial. Glenbrook cannot now claim that fee-shifting mechanisms apply to require that Ernst pay Glenbrook's costs and attorney's fees.

Prejudgment Interest. Glenbrook objects to the award of prejudgment interest arguing that the lease provides only for post-judgment interest. The lease specifies a 12% rate of interest on all costs incurred in the litigation "from the date of judgment until paid." The lease shows no clear intention of the parties to include or exclude prejudgment interest. Nevada Revised Statutes 99.040 provides:

> When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a [rate to be determined] . . . upon all money from the time it becomes due . . . (a) Upon contracts, express or implied . . .

Case law also provides that "prejudgment interest is recoverable as a matter of right in actions upon contracts for all money from the time it becomes due." Schoepe v. Pacific Silver Corp., 893 P.2d 388, 389 (Nev. 1995). This court, construing NRS 99.040, has acknowledged that Nevada law provides "that where there is no express contract fixing a different rate of interest, interest must be allowed at the rate of 12% upon all money "from the time it becomes due." In re Sigel & Co., Ltd., 923 F.2d 142, 146 (9th Cir. 1991). The construction costs eventually awarded to Ernst were known well before trial and owed as of the termination of the lease. The district court did not abuse its discretion in awarding prejudgment interest.

Ernst's Cross Appeal

Ernst cross appeals the district court's denial of Ernst's

motion for additional costs and supplemental attorney's fees incurred in opposing Glenbrook's post-judgment motions. The court denied Ernst's motion summarily. The district court was familiar with all the factors. We hold that it did not abuse its discretion.

AFFIRMED

BIBLE, HOY, TRACHOK, WADHAMS & ZIVE
DAVID R. HOY, ESQ.
Nevada Bar #0681
232 Court Street
Reno, Nevada 89501
Telephone: (702) 786-8000

GREGORY F. WILSON, ESQ.
Nevada Bar #2517
4425 Matich Drive
Reno, Nevada 89502
Telephone: (702) 827-1717

Attorneys for Defendant
Glenbrook Company [sic]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation, Plaintiff, vs. THE GLENBROOK COMPANY, a Nevada corporation, Defendant.	CV-N-91-403-HDM OFFER OF JUDGMENT

Pursuant to Nevada Revised Statute [sic], Chapter 17.115 and pursuant to Federal Rules of Civil Procedure, Rule 68, defendant, The Glenbrook Cmpany [sic], hereby offers to plaintiff, Ernst Home Center, Inc., that judgment be entered in favor of plaintiff and against defendant in the sum of TWO HUNDRED TEN THOUSAND DOLLARS ($210,000.00) with costs incurred to date.

If this offer of settlement is not accepted within ten (10) days of today's date, it shall be deemed withdrawn and cannot be given in evidence upon the trial.

Dated: May 7, 1992.

BIBLE, HOY, TRACHOK,
WADHAMS & ZIVE
GREGORY F. WILSON, ESQ.

By /s/ David R. Hoy
DAVID R. HOY, ESQ.
Attorneys for Defendant

Acceptance of Offer of Judgment

Plaintiff, Ernst Home Center, Inc., by and through its attorneys of record, hereby accepts the foregoing offer of judgment.

Dated: _____, 1992

RYAN, SWANSON & CLEVELAND

By_____
JERRY H. KINDINGER, ESQ.
Attorneys for Plaintiff

CERTIFICATE OF PERSONAL SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the law firm of Bible, Hoy, Trachok, Wadhams & Zive, and that on this date I personally delivered a true copy of the foregoing document to:

Scott A. Glogovac, Esq.
Vargas & Bartlett
201 West Liberty Street
Reno, Nevada 89501

DATED May 7, 1992, [sic]

/s/ Patrick Bible

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I hereby certify that I am an employee of Bible, Hoy, Trachok, Wadhams & Zive and that on this date, I deposited for mailing at Reno, Nevada, a true copy of the foregoing document addressed to:

Jerry H. Kindinger, Esq.
Ryan, Swanson & Cleveland
1201 Third Avenue,Suite 3400
Seattle, Washington 98101

DATED May 7, 1992.

/s/ Jean Prince

SCOTT A. GLOGOVAC
VARGAS & BARTLETT
210 West Liberty Street
P.O. Box 281
Reno, NV 89504
(702) 786-5000

JERRY KINDINGER
RYAN, SWANSON & CLEVELAND
1201 Third Avenue
Suite 3400
Seattle, WA 98101
(206) 464-4224

Attorneys for Plaintiff
Ernst Home Center, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation, Plaintiff, vs. THE GLENBROOK COMPANY, a Nevada corporation, Defendant.	CV-N-91-403-HDM NOTICE OF ACCEPTANCE OF MAY 7, 1992, OFFER OF JUDGMENT

BE ADVISED that pursuant to Fed. R. Civ. P. 68, Ernst Home Center, Inc. hereby accepts the defendant's Offer of Judgment which offer and acceptance is appended hereto and incorporated by this reference.

DATED this 15th day of May, 1992.

RYAN, SWANSON & CLEVELAND

By /s/ Jerry Kindinger by SAG
Jerry Kindinger
Attorneys for Plaintiff

CERTIFICATE OF PERSONAL SERVICE

I certify that I am an employee of Vargas & Bartlett, and that on this date I personally served a true and correct copy of the attached Notice of Acceptance of May 7, 1992, Offer of Judgment, on:

David R. Hoy, Esq.
Bible, Hoy, Wadhams & Zive [sic]
232 Court Street
Reno, Nevada 89501

Dated this 15th day of May, 1992.

/s/ Scott A. Glogovac

CERTIFICATE OF SERVICE VIA FEDERAL EXPRESS

I certify that I am an employee of Vargas & Bartlett, and that on this date, pursuant to FRCP 5(b), I served Via Federal Express, a true copy of the attached Notice of Acceptance of May 7, 1992, Offer of Judgment, addressed to:

Wilson & Szumowski
655 Montgomery Street, 16th Floor
San Francisco, California 94111

Dated this 15th day of May, 1992.

/s/ Lydia Brunell

BIBLE, HOY, TRACHOK, WADHAMS & ZIVE
DAVID R. HOY, ESQ.
Nevada Bar #0681
232 Court Street
Reno, Nevada 89501
Telephone: (702) 786-8000

GREGORY F. WILSON, ESQ.
Nevada Bar #2517
4425 Matich Drive
Reno, Nevada 89502
Telephone: (702) 827-1717

Attorneys for Defendant
Glenbrook Company [sic]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation, Plaintiff, vs. THE GLENBROOK COMPANY, a Nevada corporation, Defendant.	CV-N-91-403-HDM OFFER OF JUDGMENT

Pursuant to Nevada Revised Statute [sic], Chapter 17.115 and pursuant to Federal Rules of Civil Procedure, Rule 68, defendant, The Glenbrook Cmpany [sic], hereby offers to plaintiff, Ernst Home Center, Inc., that judgment be entered in favor of plaintiff and against defendant in the sum of TWO HUNDRED TEN THOUSAND DOLLARS ($210,000.00) with costs incurred to date.

If this offer of settlement is not accepted within ten (10) days of today's date, it shall be deemed withdrawn and cannot be given in evidence upon the trial.

Dated: May 7, 1992.

BIBLE, HOY, TRACHOK,
WADHAMS & ZIVE
GREGORY F. WILSON, ESQ.

By /s/ David R. Hoy
DAVID R. HOY, ESQ.
Attorneys for Defendant

Acceptance of Offer of Judgment

Plaintiff, Ernst Home Center, Inc., by and through its attorneys of record, hereby accepts the foregoing offer of judgment.

Dated: May 15, 1992

RYAN, SWANSON & CLEVELAND

By /a/ Jerry Kindinger
JERRY H. KINDINGER, ESQ.
Attorneys for Plaintiff

CERTIFICATE OF PERSONAL SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the law firm of Bible, Hoy, Trachok, Wadhams & Zive, and that on this date I personally delivered a true copy of the foregoing document to:

Scott A. Glogovac, Esq.
Vargas & Bartlett
201 West Liberty Street
Reno, Nevada 89501

DATED May 7, 1992, [sic]

/s/ Patrick Bible

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I hereby certify that I am an employee of Bible, Hoy, Trachok, Wadhams & Zive and that on this date, I deposited for mailing at Reno, Nevada, a true copy of the foregoing document addressed to:

Jerry H. Kindinger, Esq.
Ryan, Swanson & Cleveland
1201 Third Avenue, Suite 3400
Seattle, Washington 98101

DATED May 7, 1992.

/s/ Jean Prince

SCOTT A. GLOGOVAC
VARGAS & BARTLETT
210 West Liberty Street
P.O. Box 281
Reno, NV 89504
(702) 786-5000

JERRY KINDINGER
RYAN, SWANSON & CLEVELAND
1201 Third Avenue
Suite 3400
Seattle, WA 98101
(206) 464-4224

Attorneys for Plaintiff
Ernst Home Center, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation, Plaintiff, vs. THE GLENBROOK COMPANY, a Nevada corporation, Defendant.	CV-N-91-403-HDM NOTICE OF INTENT TO SEEK ATTORNEYS' FEES

Ernst Home Center, Inc. hereby gives notice to seek attorneys' fees as prevailing party in the above-entitled case

pursuant to applicable law and the written agreement between the parties which was the subject of this litigation and which provides:

TWENTY-SECOND: LITIGATION EXPENSE

> If either party hereto be made or shall become a party to any litigation commenced by or against the other involving the enforcement of any of the rights or remedies of such party, or arising on account of the default of the other party in its performance of any of the other party's obligations hereunder, then the prevailing party in such litigation shall receive from the other party all costs incurred by such party in such litigation, plus reasonable attorneys' fees (including on appeal and including paralegal fees) to be fixed by the court, and together with interest thereon at the rate of twelve percent (12%) from the date of judgment until paid.

[Lease Agreement, dated November 6, 1990, paragraph Twenty-Second.]

The application for attorneys' fees and costs will be timely made pursuant to applicable Court rules.

Respectfully submitted this 15th day of May, 1992.

RYAN, SWANSON & CLEVELAND

/s/ Jerry Kindinger by SAG
Jerry Kindinger
Attorneys for Plaintiff

CERTIFICATE OF PERSONAL SERVICE

I certify that I am an employee of Vargas & Bartlett, and that on this date I personally served a true and correct copy of the attached Notice of Intent to Seek Attorneys' Fees on:

David R. Hoy, Esq.
Bible, Hoy, Wadhams & Zive [sic]
232 Court Street
Reno, Nevada 89501

Dated this 15th day of May, 1992.

/s/ Scott A. Glogovac

CERTIFICATE OF SERVICE VIA FEDERAL EXPRESS

I certify that I am an employee of Vargas & Bartlett, and that on this date, pursuant to FRCP 5(b), I served Via Federal Express, a true copy of the attached Notice of Intent to Seek Attorneys' Fees addressed to:

Wilson & Szumowski
655 Montgomery Street, 16th Floor
San Francisco, California 94111

Dated this 15th day of May, 1992.

/s/ Lydia Brunell

BIBLE, HOY, TRACHOK, WADHAMS & ZIVE
DAVID R. HOY, ESQ.
Nevada Bar #0681
MARK S. SERTIC, ESQ.
Nevada Bar #0403
232 Court Street
Reno, Nevada 89501
Telephone: (702) 786-8000

GREGORY F. WILSON, ESQ.
Nevada Bar #2517
4425 Matich Drive
Reno, Nevada 89502
Telephone: (702) 827-1717

Attorneys for Defendant
Glenbrook Company [sic]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation,	) NO. CV-N-91-403-HDM)
Plaintiff,	) NOTICE OF THE) GLENBROOK
vs.	) COMPANY'S) OBJECTION TO
THE GLENBROOK COMPANY, a Nevada corporation,	)PURPORTED) "ACCEPTANCE"
Defendant.	) OF OFFER OF) JUDGMENT

RECEIVED AND FILED
MAY 18 3:48 PM '92
Carol C. Fitzergald, Clerk
By Deputy Clerk

TO: THE CLERK OF THE COURT AND TO COUNSEL FOR ALL PARTIES OF RECORD:

Please take notice that Defendant and Counterclaimant The Glenbrook Company hereby objects to the purported "Notice of Acceptance of May 7, 1992, Offer of Judgment" filed May 15, 1992 by Plaintiff Ernst Home Center, Inc. The Glenbrook Company makes its objection on the following grounds:

1. The May 7, 1992 offer was revoked and withdrawn by The Glenbrook Company's attorney's May 11, 1992 letter, a true and correct copy of which is attached hereto as Exhibit A.

2. The May 7, 1992 offer was not accepted by Ernst Home Center, Inc. for the reason that there was no

meeting of minds between the parties. Plaintiff Ernst Home Center, Inc., simultaneously with its purported Acceptance, has also filed its "Notice of Intent to Seek Attorney's Fees" when in fact Defendant The Glenbrook Company's May 7, 1992 offer was intended by The Glenbrook Company to be a compromise settlement with no attorney's fees awardable to either party as explicitly stated in The Glenbrook Company's attorney's May 11, 1992 letter, a true and correct copy of which is attached hereto as Exhibit B.

3. In the event the court finds that the May 7, 1992 offer was not revoked and withdrawn and further finds that there was a meeting of the minds between the parties and the May 7, 1992 offer was accepted, then the court should find that any such acceptance of the May 7, 1992 offer should be deemed rescinded.

DATED May 18, 1992.

BIBLE, HOY, TRACHOK, WADHAMS & ZIVE
GREGORY F. WILSON, ESQ.

By /s/ Gregory F. Wilson
GREGORY F. WILSON
Attorneys for Defendant
The Glenbrook Company

BIBLE, HOY, TRACHOK, WADHAMS & ZIVE
ATTORNEYS AND COUNSELLORS AT LAW
232 COURT STREET
RENO, NEVADA 89501-1808
TELEPHONE (702) 786-8000
FAX: (702) 786-7426

[LETTERHEAD]

May 11, 1992

VIA FACSIMILE AND REGULAR MAIL

Jerry H. Kindinger, Esq.
Ryan, Swanson & Cleveland
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

Re: Glenbrook Company adv. Ernst

Dear Mr. Kindinger:

On April 30, 1992, the Glenbrook Company offered to allow judgment to be taken against it in the sum of $90,000.00 with costs incurred to date. That offer, pursuant to NRS 17.225, remains open through close of business Monday, May 11, 1992.

On May 7, 1992 Glenbrook made an offer of judgment in the sum of $210,000.00 with costs incurred to date. To date

that offer has not been accepted. Effective immediately, the offer of May 7, 1992 in the sum of $210,000.00 plus costs incurred to date is hereby revoked and withdrawn.

Your letter of May 11, 1992 asks certain questions with respect to the May 7 offer. If you have those same questions with respect to the April 30 offer, please let me know and I will be happy to respond.

Very truly yours,

BIBLE, HOY, TRACHOK, WADHAMS & ZIVE

By /s/ David R. Hoy
David R. Hoy

DRH:jp
cc: Gregory F. Wilson, Esq.
cc: Scott Glogovac, Esq. (Hand Delivered)

EXHIBIT A

LAW OFFICES OF
WILSON & SZUMOWSKI
A PROFESSIONAL CORPORATION
16TH FLOOR
655 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94111-0602
TELEPHONE (415) 421-2800
FACSIMILE (415) 421-2881

[LETTERHEAD]

May 11, 1992

VIA FACSIMILE & U.S. MAIL

Jerry H. Kindinger, Esq.
Ryan, Swanson & Cleveland
1201 3rd Avenue, Suite 3400
Seattle WA 98101

Ernst Home Center, Inc. v. The Glenbrook Company
Case No. CV-N-91-403-HDM

Dear Mr. Kindinger:

I spoke today by telephone with Ms. Betty Stewart, calendar clerk to Federal District Judge Howard D. McKibben. Ms. Stewart advised that the Judge is commencing a criminal jury trial today which is anticipated to last no less than three (3) weeks. For this reason, Ms. Stewart advised that, unless that criminal case unexpectedly was resolved, our case would not proceed to trial on May 18 and would have to be rescheduled.

EXHIBIT B

Ms. Stewart requested that the parties stipulate to a new trial date which meets their respective schedules and transmit such stipulation to her by the end of the day tomorrow.

Ms. Stewart indicated that certain dates in August, 1992 were available which were in conflict with my trial schedule. Ms. Stewart advised that any Tuesday from September 22, 1992 through October 27, 1992 is available. She recommended September 29, as a favorable date because it appeared to be the least congested on her calendar and the first to accommodate a five (5) day jury trial. Ms. Stewart cautioned that any trial date would be stacked, that is, subject to multiple settings including criminal settings. Ms. Stewart may be reached at (702) 784-5523.

In light of these developments, we propose that the parties stipulate to September 29, 1992 for jury trial with an estimated length of five (5) days. We enclose a proposed stipulation for your review.

Because of the postponement of the trial, we have deterred further work on our jury instructions and hence will not be forwarding our proposed instructions.

I now have had the opportunity to review both your letter of May 11, 1992 and Mr. Hoy's letter of this afternoon revoking and withdrawing the May 7, 1992 $210,000.00 offer of judgment.

Inasmuch as our April 30, 1992 offer of judgment of $90,000.00 remains open and you may have similar questions with respect to that offer, we respond to your questions in the order presented in your letter as follows:

1. The $90,000.00 offer, if signed and filed by plaintiff, constitutes a full and complete adjudication of the action and shall be deemed a compromise settlement pursuant to NRS 17.115(7). Hence, all claims by either party are compromised by your signing and filing of the offer of judgment.

2. The sum of $90,000.00 does not include taxable costs incurred as of April 30, 1992. The language of our offer follows the language of Federal Civil Procedure Rule 68 "with costs then accrued." Thus, in addition to the sum of $90,000.00, our client would pay your client the taxable costs incurred as of April 30, 1992. Please note that taxable costs are strictly and narrowly defined. See District of Nevada Local Rule 205

3. With respect to attorney's fees, if your client accepts the $90,000.00 offer, the judgment "shall be deemed a compromise settlement" NRS 17.115(7). Accordingly, there is no "prevailing party" pursuant to the terms of the lease and hence no attorney's fees are awardable to either party.

In sum, if your client instructs you to sign the offer of judgment and file the same, this entire dispute will be compromised and settled by the payment by our client to your client of the sum of $90,000.00 plus taxable costs incurred as of April 30, 1992 as defined and allowed by the applicable federal statutes and the District of Nevada Local Rules.

Our April 30, 1992 offer judgment comports with the standard practice in our district and is, in our view, clear on its face. However, Mr. Hoy and I would be pleased to answer any further inquiries you may have. Let me remind you that, pursuant to NRS 17.115(3), if our $90,000.00 offer is not

accepted within ten (10) days after it is made, it shall be deemed withdrawn.

Please telephone either Mr. Hoy or myself regarding the enclosed stipulation.

Very truly yours,
/s/ Gregory F. Wilson
Gregory F. Wilson

GFW/pls

cc: Scott Glogovac, Esq. (w/enclosure via facsimile)

7357.01kinding2.ltr

CERTIFICATE OF PERSONAL SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the law firm of Bible, Hoy, Trachok, Wadhams & Zive, and that on this date I personally delivered a true copy of the foregoing document to:

Scott A. Glogovac, Esq.
Vargas & Bartlett
201 West Liberty Street
Reno, Nevada 89501

DATED May 18, 1992,

/s/ Chad A. Bible

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I hereby certify that I am an employee of Bible, Hoy, Trachok, Wadhams & Zive and that on this date, I deposited for mailing at Reno, Nevada, a true copy of the foregoing document addressed to:

Jerry H. Kindinger, Esq.
Ryan, Swanson & Cleveland
1201 Third Avenue, Suite 3400
Seattle, Washington 98101

DATED May 18, 1992.

/s/ Jean Prince
Jean Prince

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ERNST HOME CENTER, INC.,	)	CV-N-91-403-HDM
	)	(PHA)
Plaintiff(s),	)	
	)	MINUTES OF THE
vs.	)	COURT
	)	
THE GLENBROOK COMPANY,	)	March 18, 1993
	)	
Defendant(s).	)	

FILED MAR 19 1:58 PM '93
CAROL C. FITZGERALD, CLERK
BY DEPUTY JL

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: Donna Casey

Counsel for Plaintiff(s): Jerry Kindinger

Counsel for Defendant(s): David R. Hoy

PROCEEDINGS: Telephonic Hearing on Defendant's Objections to the Report and Recommendation of the U. S. Magistrate Judge (#80)

2:58 p.m. Court convenes

Arguments are presented.

The Court finds the offer of settlement lacked mutual assent and was not binding.

IT IS ORDERED that the Report and Recommendation of the U. S. Magistrate Judge (#80) is rejected.

IT IS FURTHER ORDERED that defendant's Motion to Strike purported "Acceptance" of Offer of Judgment (#55), plaintiff's Motion for Determination of Costs (#56), and defendant's Motion to Strike (#62) are denied as moot.

IT IS FURTHER ORDERED that unless counsel contact the deputy clerk (702-784-5523) within the next two days to request a hearing, the motions in limine (#36 & #37) shall stand submitted.

3:20 p.m. Court adjourns.

THEREAFTER, IT IS ORDERED that the trial on calendar for Monday, March 29, 1993, is vacated.

CAROL C. FITZGERALD, CLERK

By: /s/ Betty Stewart
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation,

Plaintiff,

vs.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant.

CV-N-91-403-HDM

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
SEP 16 5 25 PM '94
CAROL L. FITZGERALD, Clerk
by: Deputy Clerk

ENTERED & SERVED
SEP 19 1994
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY: Deputy Clerk

This case, having been tried to the court without a jury, and the court, having considered all of the evidence and being fully advised, hereby enters its findings of fact and conclusions of law

FINDINGS OF FACT

1. Plaintiff Ernst Home Center, Inc. ("Ernst") is a Washington corporation with its principal place of business in Seattle, Washington.

2. Defendant The Glenbrook Company ("Glenbrook") is a Nevada corporation with its principal place of business in Carson City, Nevada.

3. On or about November 6, 1990, Ernst and Glenbrook entered into a lease agreement.

4. Under the terms of the lease agreement, Ernst would construct a home improvement store at the Southgate Shopping Center in Carson City, Nevada, and Glenbrook would pay Ernst a construction allowance as defined under section 4.5

of the lease. The lease further provided that Ernst would pay Glenbrook annual rent of approximately two hundred and seventy thousand dollars ($270,000.00), plus an additional rental based upon a percentage of Ernst's sales.

5. Under the terms of the lease, Glenbrook was to obtain financing to pay for the Ernst construction costs on or before March 1, 1991. Under paragraph 14.7 of the lease, the obligation of Glenbrook to pay the construction allowance to Ernst was expressly contingent upon Glenbrook obtaining financing that was reasonably acceptable to it.

6. Between 1990 and 1991, the real estate loan market was limited and loans were difficult to secure. Glenbrook was unable to obtain acceptable financing by March 1, 1991. In February 1991, Glenbrook advised Ernst it had the possibility of obtaining financing from Bank of the West and asked Ernst to extend the March 1, 1991 financing deadline to April 30, 1991. No written modification was made to the lease

at that time.

7. In February, 1991, Ernst entered into a construction contract with Shaw Construction of Carson City to build the Ernst store at the Southgate Shopping Center. Glenbrook approved Shaw Construction as the contractor. On February 25, 1991, Rob King, Director of Store Planning and Development for Ernst, wrote Glenbrook and advised it that Ernst would not give "notice to proceed" to its contractor until "financing was in place."

8. On March 1, 1991, the Bank of the West informed Glenbrook that it was interested in loaning Glenbrook approximately five million dollars ($5,000,000.00) to construct the Southgate Shopping Center. On April 16, 1991, Bank of the West Loan Committee approved the loan.

9. On April 22, 1991, Randy Nahas, on behalf of Glenbrook, advised Ellis Kantor, Ernst's Director of Real Estate, by telephone that the bank's loan committee had approved the

loan.

10. At that time, Ernst was anxious to commence construction of its store. Ernst was aware that Supply One planned to open a store directly across highway 395 from Ernst's proposed store, and Ernst wanted to open its store by September 2, 1991.

11. Ernst's construction schedule required 105 days from the notice to proceed to complete construction. In order to open the store by September 2, 1991, Ernst had to have construction completed July 26, 1991; therefore, Ernst's deadline for commencing construction to meet that schedule was April 12, 1991.

12. On April 9, 1991, a building permit was issued to Supply One to construct its store.

13. On April 19, 1991, Glenbrook sent copies of Supply One building plans to Ellis Kantor.

14. On April 25, 1991, Randy Nahas sent a letter to Ernst confirming a discussion he had with Ellis Kantor on that same date. That letter advised Kantor as follows: "Glenbrook has obtained the approval of a construction loan from Bank of the West as of April 16, 1991. This loan has sufficient funds to construct the Ernst store in the Southgate Shopping Center." The April 25 letter also requested that Ernst acknowledge, by signing at the bottom of the letter, that Ernst did not intend to cancel the lease under section 4.7 of the agreement relating to the financing contingency since the March 1, 1991 deadline had passed. Glenbrook sought this acknowledgement because it did not want to pursue negotiations with Bank of the West if Ernst was going to terminate the lease.

15. After discussions with his attorney, Kantor signed the letter acknowledging Ernst did not intend to terminate the lease. No discussion was had between Kantor and his attorney about commencing construction in reliance upon

that letter at that time.

16. Once in receipt of the April 25 letter, Ernst began preparations for construction. On May 3, 1991, Ernst held a preconstruction meeting with all contractors at the site. On that same date, Ernst advised Glenbrook representatives that construction had begun. On May 8, 1991, Jim Kiser, counsel for Glenbrook, learned that Ernst had commenced construction. He then contacted Michael Tronquet, attorney for Ernest [sic], and advised Tronquet that construction had commenced. Both expressed surprise that construction had commenced on the project.

17. On May 9, 1991, Tronquet advised Kiser that the April 25, 1991 letter constituted notice under section 14.7 of the lease that financing had been obtained and, therefore, Ernst could commence construction.

18. On May 10, 1991, Bank of the West delivered the draft loan documents to Kiser. Those documents consisted

of 280 pages. On May 11, 1991, Kiser met with R.T. Nahas to review the loan documents. They both concluded that as written the loan documents were unreasonable and unacceptable.

19. On May 11, 1991, Shelly Turner, on behalf of Glenbrook, was instructed by R.T. Nahas to go to the construction site and tell Shaw Construction to stop construction. She did so, and on May 13 construction was stopped. On May 13, 1991, R.T. Nahas telephoned Tom Stanton, Ernst's Vice-President of Operations, and informed him of the problems with the loan documents. Nahas offered several alternatives to construction, none of which were acceptable to Ernst.

20. On May 14, 1991, Kiser spoke with Tronquet and Tronquet indicated that Ernst still wanted to proceed with the agreement. Kiser informed Tronquet that Glenbrook representatives would discuss the problems with the bank and

see if they could be resolved. On May 20, 1991, Ron Nahas met with bank officials and proceeded to review a portion of the loan documents. Many of the difficulties were resolved at that meeting. On May 20, 1991, R.T. Nahas first learned of a letter dated May 16, 1991 from Tronquet to Kiser in which Ernst stated that the lease would be deemed terminated as of noon on Friday, May 24, 1991, unless Glenbrook provided notice within eight (8) days that it (a) had obtained financing, (b) would pay all the costs as determined by Ernest [sic] to be owing by Ernst resulting from the cessation of construction, and (c) would pay the costs to be incurred to accelerate construction so that the store could open by September 2, 1991.

21. Nahas reasonably concluded that Glenbrook could not meet the demands set forth in the letter from Ernst, and on May 29, 1991, Glenbrook accepted Ernst's offer to terminate the lease.

22. The costs incurred by Ernst as contemplated by section 14.7 of the lease are in the sum of $175,617.75.

23. Ernst has not opened, or attempted to open, a store in Carson City since 1991.

CONCLUSIONS OF LAW

1. Neither Ernst nor Glenbrook breached the terms and conditions of the lease agreement entered into on November 6, 1990. Glenbrook was simply unable to secure financing reasonably satisfactory to Glenbrook and, therefore, was unable to meet the financing contingency of paragraph 14.7 of the least [sic] agreement.

2. The April 25, 1991 letter from Randy Nahas to Ellis Kantor constituted notice that Glenbrook had obtained the approval of a construction loan from Bank of the West as of April 16, 1991 and that the loan had sufficient funds to construct the Ernst store in Southgate Shopping Center. The letter did not constitute final notice that the financing was

reasonably satisfactory to Glenbrook.

3. Glenbrook should have stated in the letter of April 25, 1991 and through its representations in conversations with Ernst that the proposed financing might not be reasonably satisfactory to Glenbrook. Ernst should not have proceeded immediately with construction without securing further assurances from Glenbrook that the construction loan which had been approved by Bank of the West was in a condition which was reasonably satisfactory to Glenbrook. Both Glenbrook and Ernst knew the risks involved in proceeding with construction until the loan documents were reviewed and approved by Glenbrook. Nevertheless, Ernst proceeded with construction and Glenbrook, for a period of time between May 3 and May 13, permitted the construction to go forward without advising Ernst that the loan agreement was not reasonably satisfactory to Glenbrook.

4. By signing and returning to Glenbrook the April 25, 1991 letter, Ernst consented to an extension of the financing contingency provisions of section 14.7 of the lease agreement. At the time construction on the building occurred, the financing contingency provision of the lease agreement continued in effect and was binding upon the parties.

5. Glenbrook used its best efforts to obtain the financing required by the terms of the lease agreement.

6. Glenbrook acted reasonably in not agreeing to execute the loan documents originally submitted by Bank of the West as essential and material provisions of the loan documents were unreasonable.

7. Approval of the loan by the loan committee by Bank of the West did not constitute obtaining financing as contemplated by section 14.7 of the lease. Financing was not obtained within the meaning of the agreement until all of the loan documents were executed by all the parties and the

appropriate documents were recorded and the lender made the loan funds available to the borrower.

8. At all times Ernst and Glenbrook acted in good faith. Glenbrook acted in good faith in attempting to secure financing and in attempting to apprise Ernst of the status of the loan commitments. Ernst acted in good faith in proceeding with construction and then terminating construction as soon as it became aware that financing was not in place because Glenbrook was unable to secure financing reasonably satisfactory to Glenbrook.

9. Both parties are estopped from recovering damages in excess of those contemplated under paragraph 14.7 of the lease agreement. Both parties were aware that financing satisfactory to Glenbrook had to be obtained, that approval of a loan or a loan commitment by Bank of the West did not satisfy the language of paragraph 14.7 which required Glenbrook to be reasonably satisfied of the provisions and conditions in the loan

documents.

10. The lease was terminated on May 24, 1991 pursuant to the terms of the Tronquet letter of May 16, 1991. The provisions of paragraph 14.7 of the lease agreement contemplate the damages which may be recovered by Ernst in the event it commences construction without final approval by Glenbrook of the loan documents. It specifically provides that if a tenant elects to terminate the lease pursuant to the provisions of paragraph 14.7, the landlord and tenant agree that all costs incurred by the tenant in connection with construction of the building shall be paid by the landlord. Here, the cost of such construction is in the sum of $175,617.75. Since the court finds that Glenbrook did not breach the terms and conditions of the lease agreement, nor did it negligently or intentionally misrepresent any material facts to Ernst, Ernst is precluded from recovering lost profits or other damages not contemplated by the provisions of paragraph 14.7 of the lease agreement.

11. At no time did Glenbrook inform Ernst that financing was in place or that the loan documents had been approved. Nevertheless, it was not unreasonable for Ernst to proceed with construction of the Ernst store in the Southgate Shopping Center in the belief that Glenbrook would find the loan documents reasonably satisfactory considering the time constraints confronting both parties. Because of its conduct, Glenbrook is estopped from denying its obligation to pay the costs of construction under paragraph 14.7 of the lease. The fact that Glenbrook did not find the loan documents reasonably satisfactory does not permit Ernst to recover for lost profits but confines Ernst's recovery to the costs contemplated by the provisions of paragraph 14.7 of the lease agreement. Glenbrook has failed to establish any of its counterclaims. Ernst has failed to establish any of its claims other than entitlement to recover under paragraph 14.7 of the lease agreement.

12. Judgment in favor of Ernst consistent with the findings and conclusions of this court in the amount of $175,617.75 shall be entered against Glenbrook.

13. Ernst is the prevailing party and is entitled to its reasonable attorneys' fees and costs under the provisions of the lease agreement. The amount of attorneys' fees shall be set by the court upon separate application and incorporated into the judgment, together with taxable costs.

14. Ernst shall be entitled to pre-judgment interest on the liquidated amount of $175,617.75 at 12 percent per annum from May 13, 1991.

15. Counsel for Ernst shall prepare a judgment consistent with these findings and conclusions and submit the same to the court within ten (10) days of the date of the entry of these findings. Counsel shall also submit its detailed request for fees, including consideration of the factors in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), within ten

(10) days. Counsel for Glenbrook shall have ten (10) days thereafter to file any opposition to the fee request.

It is so ORDERED.

Dated this 16th day of September, 1994.

/s/ Howard D. McKibben
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation,

Plaintiff,

vs.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant.

CV-N-91-403-HDM

JUDGMENT

FILED
SEP 29 4 42 PM '94
CAROL L. FITZGERALD
CLERK
By: /s/ RM Deputy Clerk

ENTERED & SERVED
SEP 30 1994
CLERK U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY: /s/ RM DEPUTY

In the above-entitled matter, having come on for trial before the undersigned judge, without a jury, the court having

entered its findings of fact and conclusions of law on September 16, 1994, and having concluded Ernst Home Center, Inc. to be the prevailing party; now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that judgment be awarded in favor of Ernst Home Center, Inc., against defendant The Glenbrook Company in the amount of one hundred and seventy-five thousand, six hundred and seventeen dollars and seventy-five cents ($175,617.75) plus pre-judgment interest from May 13, 1991, at 12% per annum in the amount of $69,457.61 to September 1, 1994, and thereafter interest at $57.737 per diem; it is further

ORDERED, ADJUDGED and DECREED that plaintiff is entitled to reasonable attorneys' fees as determined by the court and taxable costs of suit.

Dated this 29th day of September, 1994.

/s/ Howard D. McKibben
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation,

Plaintiff,

vs.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant.

CV-N-91-403-HDM

ORDER

FILED
DEC 23 11 01 AM '94
CAROL L. FITZGERALD, CLERK
BY: /s/ RM DEPUTY

The plaintiff Ernst Home Center has moved for fees and costs. The defendant Glenbrook Company has also moved for its fees and costs.

First, the court concludes that defendant Glenbrook is not entitled to an award of fees and costs. It is not the

prevailing party. Judgment was entered in favor of Ernst Home Center and against Glenbrook. Glenbrook's contention that it is the prevailing party because it submitted an offer of judgment which was accepted is not supported by the evidence. The court had concluded that the offer of settlement was not binding. Glenbrook revoked the offer of judgment and represented that it had done so to the court. Glenbrook moved to strike Ernst's acceptance of the offer of judgment. It was necessary for this litigation to go forward because Glenbrook sought and secured an order from this court that Glenbrook had revoked the offer of judgment upon which it now seeks to obtain attorneys' fees and costs.

Therefore, the court finds that the provisions of NRS 17.115 are inapplicable and Ernst is entitled to its fees and costs and prejudgment interest.

The plaintiff has moved for attorneys' fees as prevailing party in the action pursuant to Fed. R. Civ. P. 54(d)(2) and LR

205. The court has reviewed the affidavits filed in support of the motion for attorneys' fees together with the billing statements. The court finds the billings in this case to be reasonable. Discovery, motion practice, and settlement efforts in this case were substantial. Pretrial preparation required substantial investigation and efforts, and the trial was one which required above-average skills and preparation. All fees requested by Mr. Kindinger and the local counsel, Scott Glogobac [sic], were incurred and are reasonable. The billing rates of $160-200 an hour for the partners' rates and associate rates of $85-115 and the paralegal rates of $60-70 per hour are reasonable rates and reflect the prevailing hourly rates in the Reno area. Counsel for the plaintiff has submitted detailed lists of services performed. This submission reflects the expenditure of 953.27 hours of attorney time and 506.43 hours of legal assistants' time for the firm of Ryan, Swanson & Cleveland. In addition, the billing records of Vargas & Bartlett reflect a total

number of hours of 92.70 relating to attorney time and 4.20 hours of legal assistants' time. The court does not perceive the number of hours to be disproportionate to the time and labor required for this type of action. Several of the legal issues in the case were substantial, and the resolution of these issues required expert testimony and substantial pretrial preparation. There was substantial difficulty involved in adequately investigating the action and preparing it for trial and handling the trial.

The Ninth Circuit requires consideration of twelve factors in determining the reasonableness of attorneys' fees. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975). The court has already considered the time and labor involved and concluded that the action justified the number of hours and hourly rate in connection with the proper representation of the plaintiff. In considering the novelty and difficulty of the questions presented, the court is satisfied that this case was relatively complex and presented substantial legal

issues for which the plaintiff's counsel should be appropriately compensated.

A substantial degree of skill was required to perform the legal services properly in this case, and counsel for plaintiff is entitled to be compensated for the undertaking of those legal skills in a competent and professional manner.

While there is little indication that counsel was restricted in accepting other cases as a result of the involvement in this case, the record does appear to support the conclusion that since substantial time was expended on this case, it necessarily restricted counsel in undertaking other cases.

The court has already determined that the fees sought in this case are customary and ordinary rates to charge in the community and that the amount of time spent is a reasonable time considering the complexity of the case.

In connection with the amount involved and the results obtained, the court concludes that the plaintiff was successful in

this action and that the award was a substantial one.

In connection with the issue of the undesirability of the case, it does not appear that this was a particularly undesirable case.

On the issue of the experience, reputation, and ability of the attorney, the record reflects that counsel for plaintiff were very respected members of the legal community and highly competent and experienced attorneys. Taking into consideration all of the foregoing, the court concludes that the fees sought by plaintiff's counsel in this action are reasonable and should be awarded.

It is, therefore, hereby ORDERED that plaintiff is allowed reasonable attorneys' fees and costs in this action in the amount of one hundred and eighty-two thousand, five hundred and eighty-eight dollars and fifty-five cents ($182,588.55).

Plaintiff's motion for supplemental attorneys' fees (#121) is denied.

It is so ORDERED.

Dated this 23rd day of December, 1994.

/s/ Howard D. McKibben
UNITED STATES DISTRICT JUDGE

BIBLE, HOY, TRACHOK, WADHAMS & ZIVE
DAVID R. HOY, ESQ.
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Telephone: (702) 786-8000

Attorneys for Defendant Glenbrook
Company [sic]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERNST HOME CENTER, INC., a Washington corporation,	)	CV-N-91-403-HDM
Plaintiff,	)	
vs.	)	NOTICE OF APPEAL
THE GLENBROOK COMPANY, a Nevada corporation,	)	
Defendant.	)	

FILED
JAN 20 3:30 PM '95
Carol C. Fitzgerald
Clerk of United States District Court
By Deputy Clerk

Notice is hereby given that The Glenbrook Company, Defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from: (1) Judgment entered on September 30, 1994, (2) Order awarding/denying attorneys' fees and costs entered on December 23, 1994, and (3) Order Denying Motion to Amend Findings and Judgment and Motion to Alter or Amend Judgment dated December 23, 1994.

DATED this 20th day of January, 1995.

BIBLE, HOY, TRACHOK,
WADHAMS & ZIVE

By /s/ Mark S. Sertic
MARK S. SERTIC, ESQ.
Attorneys for Defendant

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of the law firm of BIBLE, HOY, TRACHOK, WADHAMS & ZIVE, Attorneys at Law, and that on the 20th day of January, 1995, I deposited for mailing at Reno, Nevada, postage prepaid, a true copy of the foregoing or attached document, addressed to:

Jerry H. Kindinger, Esq.
Ryan, Swanson & Cleveland
1201 Third Avenue, Suite 3400
Seattle, Washington 98101

/s/ Janet L. Wilson

CERTIFICATE OF HAND DELIVERY

Pursuant to FRCP 5(b), I certify that I am an employee of the law firm of BIBLE, HOY, TRACHOK, WADHAMS & ZIVE, Attorneys at Law, and that on the 20th day of January, 1995, I personally delivered a true copy of the foregoing or attached document to:

Scott A. Glogovac, Esq.
Vargas & Bartlett
201 West Liberty Street
Reno, Nevada 89504

/s/ Samantha Stinchfield

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-15397/DC No. CV-91-00403-HDM

ERNST HOME CENTER, INC., a Washington corporation,

Plaintiff-Appellee,

v.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant-Appellant.

No. 95-15410/DC No. CV-91-00403-HDM

ERNST HOME CENTER, INC., a Washington corporation,

Plaintiff-Appellant/Cross-Appellee

v.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant-Appellee/Cross-Appellant

ORDER

FILED
JUL 17 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: BROWNING, NOONAN, Circuit Judges, and MERHIGE**, District Judge

The memorandum disposition filed on May 23, 1996 is amended as follows:

Strike the paragraph at page 7 now headed "Glenbrook's Attorney's Fees", and replace it with

> **Glenbrook's Costs and Attorney's Fees.** Glenbrook made an offer of judgment in the amount of $210,000 prior to trial. It is argued whether in determining the effect of this for Federal Rule of Civil Procedure 68 or NRS 17.115(4) applies. In a diversity suit state rules on the award of attorney's fees are valid unless they run counter to federal law. Aleyska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259, n.31 (1975). Under NRS 17.115(4) Nevada does not include costs in determining whether the offer of judgment is greater than the judgment obtained. Federal courts compare the amount of the offer against the judgment actually received plus costs accrued to the date of offer.

** The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Marek v. Chesny, 473 U.S. 1, 9-10, n.2 (1985). In our case the lease, paragraph Twenty-Second, defined costs as "all costs incurred . . . in such litigation, plus reasonable attorneys' fees (including on appeal and including paralegal fees) to be fixed by the court." Ernst's judgment of $175,617.75, plus its costs of the date of the offer (over $125,000 in costs including attorney's fees) far exceed Glenbrook's offer of $210,000. We follow the federal rule in holding that Glenbrook's offer did not exceed what Ernst obtained by trial. The district court reached the correct result in denying Glenbrook's motion for fees and costs and in declining to apply the fee-shifting mechanism of NRS 17.115(4).

With this amendment, the panel votes to deny the petition for rehearing.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNST HOME CENTER, INC., a Washington corporation,

Plaintiff/Appellee/
Cross-Appellant,

vs.

THE GLENBROOK COMPANY, a Nevada corporation,

Defendant/Appellant/
Cross-Appellee.

NO. 95-15397

FILED
JUNE 5, 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
DC #CV-N-91-403-HDM

PETITION FOR REHEARING

DAVID R. HOY, ESQ.
MARK S. SERTIC, ESQ.
BIBLE, HOY, TRACHOK
& WADHAMS
232 Court Street
Reno, Nevada 89501

Attorneys for Appellant/Cross-Appellee

The Glenbrook Company hereby petitions this Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure for a rehearing.

I

STATEMENT OF COUNSEL

This Petition for Rehearing is based upon the grounds that critical facts were overlooked by this Court which led it to

make erroneous factual findings upon which it based its decision to affirm the district court's award of attorneys' fees, costs and interest to Ernst and the district court's denial of attorneys' fees and costs to Glenbrook. Specifically, this Court erred in concluding that the district court determined that Ernst had validly accepted Glenbrook's offer of judgment in the amount of $210,000 and that Glenbrook contends that it was the prevailing party "by virtue of having submitted an offer of judgment which Ernst accepted." See pages 5 and 7 of the Memorandum Decision. In fact, the record is clear that the district court determined that Ernst did not validly accept the offer of judgment. Furthermore, Glenbrook's argument that it was the prevailing party was based on the fact that Ernst had failed to accept the offer of judgment. The undersigned counsel hereby certifies that in his judgment this Court has overlooked these material points of fact and that a rehearing is proper.

II

ARGUMENT

A. INTRODUCTION

This Court rejected Glenbrook's position that it was the prevailing party pursuant to FRCP 68 and NRS 17.115 on the following basis:

> The district court properly denied Glenbrook's motion for fees and costs, rejecting the argument that Glenbrook was the prevailing party by virtue of having submitted an offer of judgment which Ernst accepted. The hearing on the offer of judgment resulted in both parties being released from the offer because it was not binding.

Memorandum Decision, p. 7. This finding contains three separate errors.

First, Glenbrook did not argue that it was the prevailing party because Ernst accepted its offer of judgment. Glenbrook's argument was based on the fact that Ernst failed to accept its offer.

Second, Ernst did not accept the offer of judgment and

the district court clearly found that its attempt to accept the offer while at the same time seeking to recover its attorneys' fees constituted a failure to validly accept the offer.

Third, the district court did not conclude that the offer was not binding but, rather, that the offer and acceptance, i.e., the purported settlement, was not binding on the parties.

B. GLENBROOK WAS THE PREVAILING PARTY BECAUSE ERNST FAILED TO ACCEPT ITS OFFER OF JUDGMENT, NOT BECAUSE ERNST ACCEPTED IT.

Glenbrook has consistently held the position that Ernst failed to accept its offer of judgment because it sought to both accept the offer and obtain attorneys' fees. This is true both as to Glenbrook's Objection to the Report and Recommendation of Magistrate (CR 81, 85), as well as to Glenbrook's motion for attorney's fees filed after trial (CR. 120, 134). Glenbrook has never argued that Ernst validly accepted its offer. If Ernst had, in fact, validly accepted the offer of judgment, the case would have been settled long ago for the $210,000 set forth in the offer of judgment.

C. ERNST DID NOT ACCEPT THE OFFER OF JUDGMENT.

Ernst purported to accept the offer of judgment by filing a "Notice of Acceptance of May 7, 1992 Offer of Judgment." CR 51. However, Ernst simultaneously sought to recover its attorneys fees in addition to the offer of judgment. CR 52. This attempt to accept more than was offered constituted a rejection and counter offer and thus no binding agreement was formed. Radecki v. Amoco Oil Co., 858 F.2d 397 (8th Cir. 1988). The district court specifically found that Ernst did not validly accept the offer of judgment:

> Well, the Court finds, as a matter of law in this case that there was an offer and acceptance, that it was irrevocable under Rule 68. I find, however, that they lacked mutual assent, that the use of -- the word 'costs' as it was used here, appears clear to this Court, to mean court costs. Costs that were incurred that were properly taxable in connection with the litigation as would be contemplated under the local rules. It did not refer to, nor would it reasonably be concluded that it referred anything [sic] under paragraph 22 of the lease, or that it would normally include attorney's fees.

. . .

> In any event, it's clear that that's a very, very material modification of what existed here. It seems to this Court that because there was not a mutual understanding of the terms and conditions, there were letters that were written to try to clarify that, under the circumstances there's not a binding offer and acceptance here, which is enforceable upon the parties. And this argument that's been made today, I think, makes that even plainer. (Emphasis added.)

Reporter's Transcript of March 18, 1993, pp. 12-13. Excerpts of Records, Tab No. 6.

Perhaps the confusion by this Court over whether Ernst accepted the offer of judgment arises from the fact that the magistrate concluded that Ernst had, in fact, accepted the offer but could not in addition recover attorney's fees. CR 80. However, the record is clear that the district court rejected this conclusion and held that Ernst had not validly accepted the offer of judgment.

D. THE DISTRICT COURT CONCLUDED THAT THE PURPORTED SETTLEMENT WAS NOT BINDING, NOT THAT THE OFFER OF JUDGMENT WAS NOT BINDING.

Contrary to the statement on page 7 of this Court's Memorandum Decision, the district court did not release both parties from the offer of judgment; it released the parties from the purported settlement that would result from a validly accepted offer of judgment. Nowhere does the district court state that the offer, in and of itself, was not binding. The statements by the district court quoted above make clear that it found that there was no mutual assent between the offer and acceptance so that they did not form a binding settlement agreement. The Court stated "there's not a binding offer and acceptance here." This is made even clearer by the court's following statement:

> Accordingly, the findings -- or Report and Recommendations of the Magistrate is reversed. The Court finds that there is not a binding offer and acceptance here, which the parties are required to comply with and we're back to the

> point where this matter ought to go ahead toward trial.

Reporter's Transcript of March 18, 1993, pp. 13-14. Excerpts of Record, Tab No. 6. What the parties were released from having to comply with were the terms of any purported settlement that would have arisen from a valid acceptance of the offer of judgment. Never did the trial court release the parties from the fee-shifting mechanism of the offer of judgment.

E. THE ERRORS AS TO THESE MATERIAL FACTS REQUIRE A REHEARING.

The errors discussed above formed the material bases for this Court's determination to uphold the district court's award of attorneys' fees, costs and interest to Ernst and its denial of attorney's fees and costs to Glenbrook.

The fee-shifting mechanism of Glenbrook's offer of judgment remained operative at all times. At no time did the district court release the parties from this effect of the offer of judgment. Because Ernst failed to accept the offer and then

failed to better it at trial, Glenbrook is entitled to recover its attorneys' fees and costs and Ernst is precluded from recovering attorney's fees, costs and interest. FRCP 68; NRS 17.115.

This Court misunderstood the facts surrounding Ernst's rejection of the offer of judgment. As a result, its decision to affirm the decision of the district court was based upon erroneous assumptions. On rehearing, Glenbrook is entitled to a decision vacating the award of attorney's fees, costs and interest to Ernst and remanding this matter to the district court for a determination of Glenbrook's attorneys fees and costs.

DATED this 4th day of June, 1996.

BIBLE, HOY, TRACHOK
& WADHAMS

By /s/ Mark S. Sertic
DAVID R. HOY, ESQ.
MARK S. SERTIC, ESQ.
Attorneys for Defendant

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of the law firm of BIBLE, HOY, TRACHOK & WADHAMS, Attorneys at Law, and that on the 4th day of June, 1996, I deposited for mailing at Reno, Nevada, postage prepaid, a true copy of the foregoing or attached document, addressed to:

Jerry H. Kindinger, Esq.
Ryan, Swanson & Cleveland
1201 Third Avenue, Suite 3400
Seattle, Washington 98101

Scott A. Glogovac, Esq.
Burton, Bartlett & Glogovac
50 W. Liberty St., Ste. 650
Reno, NV 89501

/s/ Joy I. Keller

Supreme Court, U.S.
FILED
NOV 15 1996
CLERK

No. 96-599

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THE GLENBROOK COMPANY,

Petitioner,

v.

ERNST HOME CENTER, INC.,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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15 pp

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STATEMENT OF THE CASE

On May 7, 1992, Glenbrook sent Ernst an Offer of Judgment pursuant to Fed. R. Civ. P. 68 and NRS 17.115 in the sum of $210,000 "with costs incurred to date." Appendix to Petition for a Writ of Certiorari ("App.") 15a. By letter dated May 11, 1992, Glenbrook attempted to revoke and withdraw its Offer of Judgment. App. 36a.

On May 15, 1992, Ernst accepted Glenbrook's Offer of Judgment by signing and dating the very form drafted by Glenbrook without change, alteration or modification. App. 18a-24a. The form was subjoined to the Glenbrook Offer of Judgment. App. 16a. At the time of filing the acceptance of the Offer of Judgment with the court clerk, Ernst also gave notice of its intent to seek determination of attorney fees. App. 25a-28a.

On May 18, 1992, Glenbrook objected to Ernst's acceptance of the Offer of Judgment and moved to strike Ernst's acceptance on three grounds: First, Glenbrook reasserted it had revoked and withdrawn its Offer before

acceptance; second, Glenbrook claimed its Offer "was intended to be a compromise settlement with no attorneys' fees awardable"; third, Glenbrook asked the court to rescind the Offer if it found the Offer was not withdrawn and was otherwise binding. App. 29a-40a.

On appeal by Glenbrook from the District Court Magistrate's determination that Ernst's acceptance of the Offer was valid, Nevada District Court Judge Howard McKibben ruled that "the offer of settlement lacked mutual assent and was not binding." App. 42a.

Ernst relied upon this ruling and proceeded to trial, where it ultimately prevailed. App. 43a-61a. Glenbrook made no other offers of judgment after the District Court's ruling. App. 11a.

After trial, Glenbrook sought to recover its attorney fees pursuant to its May 7, 1992 Offer of Judgment. The District Court rejected Glenbrook's attempt:

> Glenbrook's contention that it is the prevailing party because it submitted an offer of judgment which was accepted is not

> supported by the evidence. The court had concluded that the offer of settlement was not binding. Glenbrook revoked the offer of judgment and represented that it had done so to the court. Glenbrook moved to strike Ernst's acceptance of the offer of judgment. It was necessary for this litigation to go forward because Glenbrook sought and received an order from this court that Glenbrook had revoked the offer of judgment upon which it now seeks to obtain attorneys' fees and costs.
>
> Therefore, the court finds that the provisions of NRS 17.115 are inapplicable and Ernst is entitled to its fees and costs and prejudgment interest.

App. 63a.

Glenbrook appealed the District Court's decision to the Ninth Circuit. The Ninth Circuit's initial Memorandum decision affirmed the denial of fees to Glenbrook on the same basis as the District Court:

> The district court properly denied Glenbrook's motion for fees and costs, rejecting the argument that Glenbrook was the prevailing party by virtue of having submitted an offer of judgment which Ernst accepted. The hearing on the offer of judgment resulted in both parties being released from the offer because it was not binding. Glenbrook made no further offers of judgment. The case proceeded to trial.

> Glenbrook cannot now claim that fee-shifting mechanisms apply to require Ernst to pay Glenbrook's costs and attorney's fees.

App. 11a.

Glenbrook thereafter submitted a Petition for Rehearing to the Ninth Circuit on the fee issue. Glenbrook argued that its should have been awarded fees because (1) Ernst failed to accept the Offer of Judgment, and (2) the District Court did not determine that the Offer itself was not binding, only that the parties were "released from having to comply with . . . the terms of any purported settlement that would have arisen from a valid acceptance of the offer of judgment." App. 84a.

In response to Glenbrook's Petition, the Ninth Circuit amended its Memorandum decision to state an alternate ground for affirming the District Court. The Ninth Circuit held that Glenbrook could not recover on its Offer in any event because Glenbrook was not the prevailing party. Following Supreme Court authority, the Ninth Circuit held that federal law regarding offers of judgment under Fed. R.

Civ. P. 68 rather than Nevada state law regarding offers under NRS 17.115 applied, and that under federal law, Ernst was the prevailing party. The Ninth Circuit also held that pursuant to the lease agreement which was the basis for this action, Ernst was entitled to recover its costs, including attorney fees. The Ninth Circuit therefore concluded that Ernst, not Glenbrook was the prevailing party for purposes of the Offer because Ernst's costs ($42,321.12) and fees ($83,445.95) through the date of Glenbrook's Offer together with the judgment it received ($175,617.75) exceeded Glenbrook's $210,000 Offer of Judgment. App. 74a-75a.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DENIAL OF ATTORNEY FEES TO GLENBROOK UNDER ITS VOIDED OFFER OF JUDGMENT WAS CONSISTENT WITH SUPREME COURT AUTHORITY.

In its Petition for a Writ of Certiorari ("Petition"), Glenbrook argues that the Ninth Circuit's affirmance conflicts with Supreme Court authority because it failed to

apply the substantive law of Nevada relating to attorney fees. Glenbrook argues that the Ninth Circuit improperly determined that NRS 17.115(5) conflicted with Rule 68, and therefore federal law regarding Rule 68 offers of judgment should apply.

NRS 17.115(5) provides that recoverable attorney fees and costs should not be added to a judgment in determining whether that judgment exceeds a prior offer of judgment. Under Rule 68, however, federal courts compare the amount of the offer against the judgment actually received plus costs accrued to the date of the offer, and if "costs" are defined to include attorney fees in the underlying action, then costs for purposes of Rule 68 will include attorney fees accrued through the date of the offer. See, e.g., Marek v. Chesny, 473 U.S. 1, 9-10 n.2, 87 L. Ed. 2d 1, 105 S. Ct. 3012 (1985).

Glenbrook contends that the Ninth Circuit erred in applying Rule 68 because the Rule "does not conflict" with NRS 17.115. See Petition, p. 15. Relying on the decision

in Tanker Management, Inc. v. Brunson, 918 F.2d 1524 (11th Cir. 1990), Glenbrook claims the provisions are not in "direct collision" because "NRS 117.15 concerns interest, attorney's fees, costs and offers of judgment, and Rule 68 concerns only costs and offers of judgment." See Petition, p. 16.

Glenbrook's argument is groundless. Rule 68 and NRS 17.115 obviously conflict; NRS 17.115(5) does not allow the addition of costs or attorney fees to a judgment in determining whether it exceeded an offer of judgment, while Rule 68 does. Glenbrook's comparison of the various topics addressed by the provisions is not even remotely germane.

Glenbrook's reliance on Tanker is equally groundless. In Tanker, the Eleventh Circuit determined that the prevailing defendant was not entitled to recover fees and costs under its offer of judgment because both Rule 68 and Florida law (F.S.A. § 768.79) require a plaintiff to recover some judgment, and judgment in that case was entered in

favor of the defendant. Tanker, 918 F.2d at 1527. The Eleventh Circuit determined, however, that the defendant could recover fees and costs pursuant to the "offer of settlement" it made under a different provision, F.S.A. § 45.061, which provides that a prevailing defendant may recover its attorney fees if the plaintiff unreasonably rejects an offer of settlement. The Court rejected the plaintiff's argument that F.S.A. § 45.061 was preempted by Rule 68. According to the Court, "[b]ecause Rule 68 applies only to offers of judgment and is in no way applicable to settlement offers as provided in § 45.061, Rule 68 does not preempt state law." Tanker, at 1528-29. Given that recovery in this case involves conflicting provisions concerning offers of judgment, the decision in Tanker has no bearing whatsoever on this case.

The Ninth Circuit's decision, therefore, was entirely consistent with Supreme Court authority.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH AUTHORITY FROM OTHER COURTS OF APPEAL REGARDING OFFERS OF JUDGMENT.

Glenbrook's Petition also contends that the Ninth Circuit's decision is in direct conflict with decisions of other circuits. Glenbrook claims the Ninth Circuit should have compared its Offer of Judgment plus costs accrued to the date of the Offer against the amount of the trial judgment plus costs accrued to the date of the Offer. In support of its argument, Glenbrook cites Marryshow v. Flynn, 986 F.2d 689 (4th Cir. 1993), and Grosvenor v. Brienen, 801 F.2d 944 (7th Cir. 1986). See Petition, p. 18.

Glenbrook's alternate argument is also groundless. First, the interpretation of Rule 68 urged by Glenbrook is nonsensical; adding the same amount of pre-offer costs to an offer of judgment and to a trial judgment before comparing the two would be pointless because such a step would never change the comparison.

Second, the cases cited by Glenbrook do not support its interpretation. In Marryshow, for example, the Fourth

Circuit determined that defendants in a civil rights action were not entitled to recover their fees or costs under Rule 68 because their $20,000 offer of judgment did not exceed the verdict obtained by the plaintiff ($14,500) plus the plaintiff's pre-offer attorney fees ($11,800). Marryshow, 986 F.2d at 692.

And in Grosvenor, the Seventh Circuit similarly determined that defendants in a civil rights action were not entitled to recover their fees and costs under Rule 68 because their $7,500 offer of judgment did not exceed the verdict obtained by the plaintiff ($7,001) plus the plaintiff's pre-offer costs and fees ($7,862.09). Grosvenor, 801 F.2d at 945, 948.

In neither Marryshow nor Grosvenor did the other Courts of Appeal add pre-offer costs or fees to the offer of judgment. The Ninth Circuit's decision was therefore entirely consistent with the decisions from other Courts of Appeal.

III. GLENBROOK'S OFFER OF JUDGMENT WAS NOT BINDING.

Even if the Ninth Circuit somehow erred in construing the law, its affirmance was nevertheless correct. As the District Court originally noted, and the Ninth Circuit found in its initial Memorandum decision, Glenbrook sought and received a determination that its Offer of Judgment was "not binding." App. 11a, 42a,

Both parties were therefore released from the Offer, and it cannot now be used as a grounds for recovery. As the Eighth Circuit noted in Radecki v. Amoco Oil Co., 858 F.2d 397 (8th Cir. 1988):

> We cannot hold the parties to a contract they never made. It therefore will be necessary for the parties to approach the settlement question anew. In addition, because of the unusual circumstances of this case, and the uncertainty of Radecki as to the legal effect of his post-clarification purported acceptance of Amoco's November 18 offer, we hold that the November offers have not made the cost-shifting mechanism of Rule 68 operative.

Radecki, at 403.

Regardless of the Ninth Circuit's conclusions regarding Rule 68 and NRS 17.115, therefore, its affirmance of the District Court's denial of Glenbrook's request for fees was entirely proper.

CONCLUSION

For the reasons stated above, Glenbrook's Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 15th day of November, 1996.

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(3)

No. 96-599

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1996

THE GLENBROOK COMPANY,

Petitioner,

v.

ERNST HOME CENTER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION.

The decision of the Ninth Circuit Court of Appeals directly conflicts with the authority of this Court which requires the application of the substantive law of the state governing attorneys' fees in diversity cases. Additionally, the decision of the Ninth Circuit directly conflicts with that of other circuit courts on the important question of how to determine the prevailing party for offer of judgment purposes. Finally, the Ninth Circuit's decision conflicts with decisions from other circuits in that the Ninth Circuit failed to apply the local rule of the district court directly applicable to this issue.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT AUTHORITY.

This Court has held that the substantive law of the state governing the award of attorneys' fees must be applied in diversity actions unless that law is in direct collision with a federal rule. *Alyeska Pipeline Service Co. v. Wilderness Soc.*,

421 U.S. 240, 259, 95 S.Ct. 1612, 44 L.Ed.2d. 141, 154 (1975).

Ernst's contention that Federal Rule of Civil Procedure 68 directly collides with NRS 17.115(5) is groundless. Ernst's efforts to distinguish the holding in *Tanker v. Management, Inc. v. Brunson*, 918 F.2d 1524 (11th Cir. 1990) are equally groundless. The Court in *Tanker* held that a statute that concerns attorneys' fees, offers of judgment and settlement offers was not in direct conflict with Federal Rules 68 because that rule only covered interest and offers of judgment. Ernst attempted but failed to distinguish this case.

Ernst's position is especially groundless under the facts in this case. An offer of judgment that is made with costs incurred to date means that the offer is for the amount contained in the offer plus the costs accrued to date. *Marek v. Chesny*, 473 U.S. 1, 6, 105 S.Ct. 3012, 87 L.Ed.2d. 1 (1985); *Erdman v. Cochise County, Ariz.*, 926 F.2d 877, 879 (9th Cir. 1991).

The offer of judgment in this case was for $210,000 "with costs incurred to date." App. 15a. Thus, under Rule 68, the offer of judgment in this case "with costs incurred" to the date of the offer must be compared to the actual judgment with costs incurred to the date of the offer of judgment.[1] Since the "costs incurred" will always be the same in a given case (whether or not costs include attorneys fees), the heart of the question is whether the offer of judgment without costs is the same as the final judgment without costs. The offer of judgment in this case of $210,000 obviously exceeds the judgment of $175,617.12.

Under both NRS 17.115(5) and Local Rule 205-12, costs and attorneys fees are not considered in determining the prevailing party. This does not conflict with the federal rule when the offer of judgment is made "with costs incurred," as Glenbrook did in this case. The net effect under Federal Rule

[1]The rationale behind this argument and the points and authorities in support thereof is contained in Section III of this Reply below.

68, NRS 17.115(5) and Local Rule 205-12 will always be the same when an offer of judgment is made "with costs incurred." Thus, under the facts in this case, Rule 68, NRS 17.115(5) and Local Rule 205-12 are completely consistent and are definitely not in "direct collision." Therefore, the Ninth Circuit's refusal to apply the provisions of NRS 17.115 violated the requirement of *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U.S. 240, 259, 95 S.Ct. 1612, 44 L.Ed.2d. 141, 154 (1975).

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF OTHER CIRCUIT COURTS.

Ernst's argument is based upon the assumption that it is not necessary to compare like "judgments." Ernst misconstrues *Marryshow v. Flynn*, 986 F.2d 689 (4th Cir. 1993) and *Grosvenor v. Brienen*, 801 F.2d 944 (7th 1986). *Marryshow* states as follows:

> Rule 68 requires that a comparison be made between an offer of judgment that

> includes "costs then accrued" and the "judgment finally obtained." It is neither logical nor consistent with the rule and applicable authority to compare an offer of judgment which includes all costs, including attorney's fees, and a judgment finally obtained which includes no costs. To make a proper comparison between the offer of judgment and the judgment obtained when determining, for Rule 68 purposes, which is the more favorable, like "judgments" must be evaluated. Because the offer includes costs then accrued, to determine whether the judgment obtained is "more favorable," as the rule requires, the judgment must be defined on the same basis – verdict plus costs incurred as of the time of the offer of judgment.

Id. at 692 (citing *Marek*, 473 U.S. at 7, 105 S.Ct. at 3015; *Grosvenor v. Brienen*, 801 F.2d 944, 948 (7th Cir. 1986).

A proper reading of *Marryshow* and *Grosvenor* demonstrates that Ernst's position is groundless. These cases require that like "judgments" be compared. In *Marryshow*, the offer of judgment was for $20,000.00 including costs, not plus costs as in this case. The offer in *Grosvenor* was similarly

inclusive of costs. In comparing like "judgments," the *Marryshow* court added pre-offer costs to the final judgment, and compared that figure with the offer of judgment alone since the offer "included" costs.

In this case, the offer of judgment was $210,000.00 "with costs incurred to date." "With costs incurred" means "plus 'costs then accrued . . . .'" *Marek v. Chesny*, 473 U.S. 1, 6, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). Thus, in order to compare like judgments, the Ninth Circuit was required to add to the final judgment the pre-offer costs, and compare that figure to the offer of judgment together with the pre-offer costs. The Ninth Circuit failed to do so, contrary to the decisions of this Court and other circuits.[2]

---

[2]Ernst's contention that this procedure is nonsensical is remarkable. This "nonsensical" procedure is what is expressly required by decisions of the Fourth and Seventh Circuits. Furthermore, it is not nonsensical. When an offer of judgment is made "with costs incurred to date" it is the only way to fairly compare the offer with the judgment. Conversely, when an offer of judgment is made in an amount that is expressly inclusive of costs, then the offer of judgment must be compared with the judgment plus the pre-offer costs to make a fair comparison. There is nothing nonsensical about these procedures.

IV. GLENBROOK'S OFFER OF JUDGMENT WAS VALID.

Ernst's alternative argument that even if the Ninth Circuit erred, that its decision was still correct because the offer of judgment was not binding is utterly astounding. To support its position, Ernst relies on that part of the Ninth Circuit's original decision that was withdrawn as a result of the Petition for Rehearing.

In the Petition for Rehearing, Glenbrook argued that the record clearly showed that: (1) The District Court had determined that Ernst did not validly accept the offer of judgment, not that Ernst had accepted the offer; and (2) The District Court concluded that the settlement, i.e., the offer and the acceptance, was not binding, not that the offer itself was not binding. In modifying its Decision in response to the Petition for Rehearing, the Ninth Circuit accepted these contentions and then analyzed the question of whether or not to apply NRS 17.115(5) to the facts of this case. As discussed above, the

Ninth Circuit improperly found NRS 17.115 to be inapplicable and furthermore failed to even properly apply the federal rule when it failed to compare like judgments. The Ninth Circuit has thus established a different federal procedure than that employed by other circuits. If the offer of judgment was not binding, then the Ninth Circuit would never have gotten to the issue of the applicability of NRS 17.115.

V. THE NINTH CIRCUIT FAILED TO APPLY LOCAL RULE 205-12

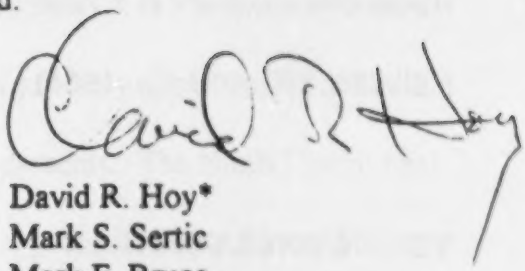
Ernst's brief in opposition does not address the Ninth Circuit's failure to apply Local Rule 205-12, which is identical to NRS 17.115(5). The only conclusion which can be drawn from Ernst's non-opposition is that Ernst concedes the argument to Glenbrook. Local Rule 205-12 provides that costs and attorney's fees should not have been included in determining the prevailing party, thereby entitling Glenbrook to attorney's fees and costs in this case. The Ninth Circuit's failure to apply this local rule conflicts with the law of other circuits. See, e.g.,

Woods Construction Co. v. Atlas Chemical Industries, Inc., 337 F.2d 888, 890 (10th Cir. 1964).

VI. CONCLUSION

The Decision of the Ninth Circuit conflicts with the decisions of this Court and the decisions of other circuits concerning the applicability of state substantive law governing attorney's fees awards in diversity cases. Additionally, the Ninth Circuit's decision is in direct conflict with the decisions of other circuits as to the proper method of determining the prevailing party when an offer of judgment is made. For these reasons, a writ of certiorari should be issued by this Court to the Ninth Circuit Court of Appeals.

Respectfully submitted.



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